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January 31, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 20, 2004

Case No.: TIA-0144

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determinations. As explained below, we have concluded that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its website provides extensive information concerning the program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

#### *B. Procedural Background*

The Applicant was employed as a research fellow at Abbott Laboratory, Oak Ridge Institute of Nuclear Studies Hospital (the hospital). He worked at the hospital for approximately four months, from May 1963 to September 1963. During that period, he was involved in handling and administering radioisotopes to cancer patients.

The Applicant filed a claim with the OWA, requesting physician panel review of six illnesses: diabetes, sarcoma and gastrointestinal cancer, bone cancer, multiple bilateral renal cysts, pedal edema and hypertension. The Applicant asserted that his illnesses were the result of exposure to toxic and radioactive chemicals at the hospital. The Applicant also filed a Subpart B claim at the DOL. In that proceeding, he was awaiting the completion of a dose reconstruction by the National Institute of Occupational Safety and Health (NIOSH). The Applicant asked that the OWA send his case to the Physician Panel, rather than await the results of the dose reconstruction.<sup>1</sup> Accordingly, the OWA sent the case to the Panel without a dose reconstruction.

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<sup>1</sup> Record at 13 (Case View History, entry for 11/06/03).

The Physician Panel rendered negative determinations with regard to the illnesses. The Panel found that the record did not contain evidence of exposure significant to conclude that Applicant's conditions were due to work-related toxic exposure. The Panel specifically cited the absence of industrial hygiene records or reports of accidental contamination. The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

In his appeal, the Applicant maintains that the Panel's negative determinations are incorrect. He asserts that during his time at the hospital, "numerous minor spills and sloppy handling of isotopes took place."<sup>2</sup> The Applicant also contends that he came into contact with toxic substances through the handling of debilitated patients' bodily fluids and that these instances of contamination remained unreported. Moreover, the Applicant argues that the rare form of cancer which he contracted is associated primarily with radiation exposure.

The Applicant has not demonstrated Panel error. The Physician Panel addressed the Applicant's claims, made its determinations, and explained its reasoning. As the Applicant recognizes, the record does not contain information concerning his alleged exposures and, therefore, the record does not support a finding of Panel error. We note that the NIOSH dose reconstruction, which was not completed when the case went to the Physician Panel, may provide further information that would support the Applicant's Subpart E claim.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the

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<sup>2</sup> Applicant's Appeal Letter.

process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0144 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: January 31, 2005